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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 580

PACIFIC ATLANTIC STEAMSHIP CO.,
Petitioner,

vs.

FLORENCE G. HOLLIDAY, AS ADMINISTRATRIX OF THE ESTATE OF CLINTON HOLLIDAY, DECEASED

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

THOMAS E. BYRNE, JR.,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Pacific Atlantic Steamship Co. respectfully prays that a writ of certiorari may issue out of this Court to review the judgment of the United States Court of Appeals for the Third Circuit entered June 27, 1952. By that judgment the Court of Appeals reversed the judgment of the United States District Court for the District of Delaware and remanded the case to the District Court with directions to enter judgment in favor of the respondent and against the petitioner upon the question of liability and to determine the amount of the damages.

Summary Statement of Matter Involved

The present case was instituted as a suit in Admiralty. It sought to recover damages for the alleged wrongful death of one Clinton Holliday who had been the cook employed on board the petitioner's vessel "Peter Kerr".

At the trial the libellant (here respondent) alleged and sought to prove that Holliday had sustained an injury to his foot and ankle during the course of his employment on board the vessel and that infection from that injury caused his death on February 18, 1942.

As the opinion of the District Court indicates (R. 122, 124) the primary charge of negligence against the petitioner had to do with alleged negligent failure to furnish a place of work which was reasonably safe. This issue was decided in favor of the petitioner by the District Court and the Court of Appeals did not disturb that finding.

A subsidiary allegation of negligence against the petitioner at trial was that it had failed to furnish proper and adequate medical attention after the injury. The factual background of this facet of the case can be briefly stated.

Shortly after the injury the vessel called at Port Elizabeth, South Africa. The testimony showed that a doctor who was dead at the time of trial had come aboard, examined Holliday, prescribed treatment for him and indicated that it was safe for him to proceed with the vessel to Capetown. At the time of trial the claim advanced was that the officers of the vessel had been negligent when they did not put Holliday ashore for hospitalization when the ship was at Port Elizabeth. The District Court found that issue in favor of the petitioner and again its finding was not disturbed by the Court of Appeals.

The vessel left Port Elizabeth for Capetown late in the afternoon of February 5th. It arrived in the roadstead off Capetown about 7 P. M. on February 7th. (Opinion

of C.A. p. 5, R. 157.) South Africa was then at war with the Axis powers and the vessel anchored in the roadstead overnight. It docked shortly after 8 o'clock the next morning and the Captain immediately sent for a doctor to attend Holliday. When that doctor arrived on board the vessel shortly after noon of February 8th he ordered Holliday taken ashore to a hospital. He remained there as a patient until his death on February 18th.

The cause of death was cardiac failure, secondary to septicemia, and nephratis (R. 114).

Although it had only the record before it, the Court of Appeals chose to hear the matter *de novo*. It accepted the testimony of the witness Cooper which had been rejected by the trial Judge who had seen and heard Cooper testify. The Court of Appeals rejected the testimony of two ship's officers which had been accepted by the trial Judge. In order to fasten liability upon the petitioner the Court of Appeals held that the delay of approximately 15 hours between the time the vessel arrived in the roadstead off Capetown on February 7th and the time the doctor actually saw and administered to Holliday was negligence. It further "concluded" that the delay was a "legally responsible cause of death".

Jurisdiction

The judgment of the Court of Appeals was entered June 27, 1952. The time within which the petitioner might file a petition for rehearing was enlarged and a petition for rehearing was filed August 11, 1952. On December 31, 1952 an order was entered by Mr. Justice Burton enlarging the time within which this petition could be filed to and including January 31, 1953. The jurisdiction of this Court to entertain this petition, grant the same, and review the judgment of the Cour of Appeals is provided by Title 28, U. S. Code, § 1254(1) and § 2101(c).

Opinion Below

The opinion of Judge Rodney of the United States District Court for the District of Delaware and his findings of fact and conclusions of law appear beginning at p. 121 of the record in this case. The opinion is reported 99 F. Supp. 173.

The opinion of the Court of Appeals, written by Judge Hastie, is reported 197 F. 2(d) 610 (R. 156).

Question Presented

May a Court of Appeals, hearing an Admiralty suit as a trial *de novo,* make its own finding of fact which it incorrectly designates as a conclusion where there is literally no evidence in the record to support it?

Reasons Relied upon for Allowance of the Writ

The question which this Court is asked to review is of immense practical importance in the proper and orderly administration of justice in the Federal Courts. With *equal* justice under law we have no quarrel. We do quarrel with the proposition that a Federal Appellate Court is free to enunciate its own notions of what may represent a socially desirable result in a given set of circumstances without regard to legal principles which time and time again this Court and other Courts have said represent the sine qua non for a judicial determination.

The problem which this case presents occurs daily in the United States Courts. This Court has said that in order to sustain an award in favor of a party upon whom the law casts the burden of proof there must be evidence which must support the conclusion in favor of that party. Here, there is not one jot of evidence and a Court of Appeals has substituted what it is pleased to call its own "proper conclusion" in place of evidence.

The case which the petitioner must here present is devoid of emotional appeal. This is not a "big" case as cases are measured by the amount of the potential verdict. If the importance of cases is to be measured by the importance of the fundamental nature of the legal principle involved then this is a case which is important in the over-all judicial picture. If the Court of Appeals is free to make a finding without evidence to support it when it sits as a Court which hears a case de novo, then any Court, District or Circuit, is free to substitute its own view for the result which would be demanded by the application of what had heretofore been regarded as fundamental principles.

It is upon this basis that we state that the present case is important and that it merits review by this Court.

I

This is an action founded upon the Jones Act, 46 U. S. C. A. 688. It is that Statute which incorporates into the Maritime law of master and servant the principles of the Federal Employers' Liability Act, 45 U. S. C. A. 90, et seq. and makes applicable to seamen the same rights as those enjoyed by employees of railroads engaged in interstate commerce. As she was free to do, respondent chose to institute the action in Admiralty rather than upon the law side of the District Court, as the Jones Act would permit her to do. The action could be maintained at all only by reason of the remedy the Jones Act affords because the unmodified Maritime law gives no right of action to recover damages for death. *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U. S. 367 @ 371.

It is a fundamental legal principle that the party who seeks to recover because of an alleged default on the part of his adversary must carry the burden of proof. The burden of proof in its primary sense rests upon the party

who asserts the affirmative of an issue.[1] If the party having the burden of proof fails to sustain it or comes forward with proof which with *equal* validity will support either one of two inconsistent inferences, then the verdict must go against the party upon whom the law casts the burden of persuasion. *Baltimore and Carolina Line* v. *Redwood*, 295 U. S. 264; *Brady* v. *So. Ry. Co.*, 320 U. S. 476; *Pa. R. Co.* v. *Chamberlain*, 288 U. S. 333.

Hearing the case *de novo*, the Circuit Court substituted its own findings for those of the District Judge. The evidence showed only that the respondent's vessel had anchored in the roadstead off Capetown at 8:05 P. M. on February 7th. The only evidence in the original record as to why the vessel did not proceed into the Harbor that night was the testimony of the vessel's Second Officer that it was "too late to go in . . ." (R. 255). The Circuit Court held that this delay constituted negligence without any evidence before it as to the reasons why the vessel did not proceed into the Harbor and obtain medical attention for Mr. Holliday that night. In support of its conclusion that there had been negligence, the Court of Appeals cites only one case, *The Iroquois*, 194 U. S. 240. That case stands only for the proposition that the Master of a vessel owes a duty to obtain medical attention for an injured seaman. It does not stand for the proposition that mere failure or delay itself constitutes negligence. There must be evidence to support the Circuit Court's conclusion of negligence, *De Zon* v. *American President Lines*, 318 U. S. 660.

When this petitioner requested the Circuit Court to grant rehearing and assigned among its reasons this "conclusion of negligence", the present respondent obtained affidavits from South Africa which would, if they qualified as evidence, have supported the decision of the Court of Appeals. It is

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[1] *Bauer* v. *Clark*, 161 F. 2(d) 397, cert. denied, 332 U.S. 889.

important to bear in mind that these were ex parte affidavits and were not in the record when the Court of Appeals reached its conclusion. We submit that they cannot support the holding of the Court of Appeals.

It is a fundamental concept of Anglo-Saxon jurisprudence that ex parte evidence is not admissible. Correctly speaking, the affidavits are not evidence at all. No opportunity was afforded the petitioner to cross-examine the witnesses and apply those tests which have always been considered necessary to afford proper safeguards before evidence is received.

Our statement above that the Court of Appeals reached its conclusion on this point from a record which contained no evidence to support its conclusion is tacitly admitted by the respondent. If there had been evidence to support the conclusion "negligence" of the Court below it would have been unnecessary for the respondent to have obtained the affidavits in South Africa which she filed only in opposition to this petitioner's request for rehearing.

Without Evidence to Support It A Court Is Not Free to Find That a Delay in Obtaining Medical Attention Was a Legally Responsible Cause of a Death Which Occurred 18 Days Later

In this, the principal reason advanced by petitioner, we rely entirely upon those portions of the testimony to which the Court below referred in its opinion. We will use them to demonstrate the completely fallacious result which that Court reached.

Writing for the Court of Appeals, Judge Hastie holds that, in the light of the chronology of events, it is proper to conclude that if Mr. Holliday had been hospitalized and treated on the night of February 7th rather than at noon on February 8th, there was a likelihood that his life might have

been saved. No evidence supports that statement. Mr. Holliday survived in a hospital under proper medical attention for 18 days before he died. The physician who treated him said not a word about any ill effects caused by the delay in treatment. It must be remembered, as the attending doctor testified, that modern treatment by penicillin was not then available. If the decedent was to lose his life in any event it does not establish causal connection or, if you please, "a legally responsible cause of death" to say that he should have been treated earlier. The law cast the burden of proof upon this respondent. The delay may or may not have been a factor in contributing to the death. The infection was already present and it has been judicially determined by two Courts that the original infection was not something for which this petitioner was responsible. The evidence here will support inconsistent inferences. The fact of delay is admitted. The effect of delay is left entirely to speculation and the Court of Appeals chose to ignore fundamental legal concepts and decisions by this Court in order to reach a result which would cast the loss upon the party best able to bear it. That is not justice under law. It is, rather, the perversion of the judicial process.

The law as to burden of proof has been stated many times by this and other Courts.

> "Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve."[2]

If damages are recoverable "under the Jones Act only for negligence" then the burden of proof rested upon this respondent (libellant below) because the burden of proof in Civil cases lies with the party who asserts the affirmative of

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[2] *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104 @ 112 and cases there cited.

the issue.[3] This applies to causation as fully as it does to negligence or any other *necessary* element of respondent's case.[4]

Thus the law cast upon the respondent the burden of proving by competent evidence that there was causal connection between the delay in treatment and the death 18 days later. We do not here make the so-called "scintilla" of evidence argument. This Court has said, "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact . . ."[5] In our case the Court of Appeals did not have a scintilla of evidence to support its conclusion of causal connection between the delay and the death. We suggest that if a jury had been the trier of fact in the case at bar, a motion for a directed verdict would have had to be granted in order to conserve judicial time and save the mischance of speculation over a legally unfounded claim.[6]

Mr. Holliday was ill on February 7th when the ship anchored overnight in the roadstead off Capetown. Two Courts have held that this Petitioner is not legally responsible for his condition as it then existed. About noon on February 8th he was treated by a physician who directed that he be hospitalized. The testimony of the attending physician was taken by commission. This doctor testified that Holliday should have been hospitalized in Port Elizabeth three days earlier. Whether that be the correct view or not makes no difference because Holliday was seen and treated by a competent doctor at Port Elizabeth on February 5th. This physician instructed the ship's officers that it was safe for Holliday to proceed with the ship to Cape-

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[3] *Lilienthals Tobacco* v. *U.S.*, 97 U.S. 237.

[4] *Brady* v. *Southern Ry. Co.*, 320 U.S. 476.

[5] *Brady* v. *Southern Ry. Co.*, 320 U.S. 476 @ 479; *Western & Atlantic R.R.* v. *Hughes*, 278 U.S. 496.

[6] *Galloway* v. *U.S.*, 319 U.S. 372.

town. Up to this point there was no negligence on the part of the ship's officers and both Courts below have so found. If Dr. Shapiro (whose testimony appears at 113 to 121a) had been asked for an opinion upon the effect of delay between 7 P. M. on February 7th and noon on February 8th, there might have been some evidence to support the Circuit Court's conclusion. No such question was asked and there is not a jot of evidence on the point. No one can tell from this record whether the delay of about 15 hours was a "legally responsible cause of death" (p. 6 of C. A. opinion; R. 161) or not. It may have been. It may have played no part. The intervening period of 18 days would certainly indicate that it would be difficult for any professional medical witness to express an opinion on the subject. Certainly there should have been evidence to support what the Court below calls "a proper conclusion". It may or may not be a proper conclusion for a medical witness but the Court below has treated it as a conclusion of law with no evidentiary basis to support it.

The testimony of Dr. Shapiro quoted by the Circuit Court (slip opinion p. 5; R. 159) that there *might* have been a virulent spread of infection during the three-day period from February 5th to February 8th will not support a conclusion that a 15-hour period of delay in treatment actually did cause death. The doctor's opinion that he found it "difficult to believe" that the infection spread so rapidly in three days negates the possibility that the 15-hour delay was vital.

The question of whether the 15-hour delay was crucial or not under the circumstances of this case was a matter concerning which evidence should and could have been produced. No evidence was produced. We simply do not know whether the likelihood of arresting the infection was decreased or not. Holliday did not die until the 18th day

after hospitalization. The tenuous conclusion of the Court below finds no support in the record.

Since the case had to be remanded for the assessment of damages in any event, we suggest that it would have been the proper course to have remanded it so that testimony on the point could have been introduced.

Conclusion

The decision of the Court below cannot be supported from the evidence in this record. In entering judgment against this Petitioner the Court below held contrary to the following decisions by this Court as well as a longer list of decisions by other Courts of Appeal.

Brady v. *Southern Ry. Co.*, 320 U. S. 476
Echenrode v. *Pennsylvania R. Co.*, 335 U. S. 329
DeZon v. *American President Line*, 318 U. S. 660
Commercial Molasses Corp. v. *New York Tank Barge Corp.*, 314 U. S. 104
Pennsylvania R. Co. v. *Chamberlain*, 288 U. S. 333
Baltimore & Carolina Line v. *Redman*, 295 U. S. 654
Henry Cross Co. v. *Simmons*, 96 F. (2) 482
Spain v. *Powell*, 90 F. (2) 580
District of Columbia v. *Vignau*, 144 F. (2) 641; cert. den. 323 U. S. 781

The present case is a classic illustration of the rule that judgment must go against the party who, having the burden of persuasion, fails to introduce evidence to support a finding essential to his recovery.

The decision of the Court below is wrong. It is important that inferior Courts know that the rules of law apply even to a hearing *de novo* before a Court of Appeals. The writ should be granted.

Respectfully submitted,

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